

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 809 of 1998

in

SPECIAL CIVIL APPLICATION No 6977 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.THAKKER and
MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

NEW PARTH CO OPERATIVE HOUSING SOCIETY LIMITED

Versus

OIL & NATURAL GAS CORPORATION

Appearance:

MR YN OZA for Appellants

MR KM PARIKH for Respondent No. 4

CORAM : MR.JUSTICE C.K.THAKKER and
MR.JUSTICE A.M.KAPADIA

Date of decision: 12/10/98

ORAL JUDGEMENT (per C.K.Thakker J.)

Admitted. Mr. K.M. Parikh, learned counsel for the respondents appears and waives service of notice on

behalf of the respondents. In the facts and circumstances of the case, the matter is taken up for final hearing to day.

This appeal is directed against the judgment and order passed by the learned Single Judge dismissing Special Civil Application No.6977 of 1997 on 1st April 1997.

The appellants are original petitioners. They approached this court by filing the above petition for the following relief in para 13 which read as under:

"13. The petitioners, therefore, pray that:

(a) be pleased to admit this petition;

(b) be pleased to issue a writ of mandamus or any other appropriate writ, order or directions, by quashing and setting aside the notice at Annexure.A to this petition;

(c) be pleased to issue a writ of mandamus or any other appropriate writ order or direction by permanently restraining the respondents, their agents, servants and subordinates from demolishing any part of the premises in occupation and possession of the members of the petitioner society in any manner whatsoever;

(d) Pending admission, hearing and final disposal of this petition, be pleased to direct the respondents, their agents, servants and subordinates not to demolish any part of the premises in occupation and possession of the members of the petitioner society, in any manner whatsoever.

(e) be pleased to grant ex-parte ad-interim relief in terms of para (d) herein;

(f) be pleased to award the costs of this petition;

(g) be pleased to pass such other and further orders as may be deemed fit in the interest of justice."

The case of the petitioners was that in 1990 New Parth

Cooperative Housing Society was incorporated and registered under the Gujarat Cooperative Societies Act, 1961. Thereafter, the society acquired the land on which the construction of bungalows were to be made for its members. The society for the said purpose obtained requisite approval and permission from the Ahmedabad Urban Development Authority ("AUDA" for short). Accordingly, construction was made. On 7th August 1997, the respondent no.4 Indian Oil Corporation Ltd. issued a notice upon the society asking it to remove the encroachment alleged to have been made by the Members of the society in respect of the area required to be left open under the provisions of the Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962 (hereinafter referred to as "the Act").

Being aggrieved by the said notice, the society filed the above petition which came up for hearing before the learned Single Judge. Notice was issued and interim relief was granted against demolition of construction said to have been made by the members of the society.

The learned Single Judge heard the parties. According to the learned Single Judge, in issuing notice to the society as well as to the members of the said society no illegality can be said to have been committed by the Corporation. The learned Single Judge also considered the affidavit-in-reply filed on behalf of the Corporation and held that the construction was made contrary to the provisions of the Act and hence the petitioners were not entitled to the protection sought. When it was argued that the action of the society was illegal, relying on the decision in A.M.Allison v. B.L.Sen, AIR 1957 SC 227, the learned Single Judge observed that, even if there was some illegality, if it did not result into failure of justice a writ court was not bound to interfere and grant relief in favour of the person who did not deserve equitable relief.

The above order is challenged in the present Letters Patent Appeal.

We have heard Mr.Oza, learned counsel for the appellant and Mr.Parikh, learned counsel for the respondent authorities.

Mr.Oza submitted that the learned Single Judge has committed an error of law in holding that writ court was not bound to interfere . He submitted that the action taken by the respondent authorities was contrary to the provisions of the Act and hence the learned Single

Judge ought to have interfered with the said action. Relying on the provisions of Sec.9 of the Act and in particular sub-section (3) thereof, it was urged that initially Parliament did not grant power of removal of construction. Only by way an amendment in 1977 (by Act No.13 of 1977) such power has been conferred on the Competent Authority. Sub-section (3) of Section 9 reads as under:

"(3) Where the owner or occupier of the land with respect to which a declaration has been made under sub-section (1) of Section 6-

(a) constructs any building or any other structure, or

(b) constructs or excavates any well, tank, reservoir or dam or

(c) plants any tree

on that land the Court of the District Judge, within the local limits of whose jurisdiction such land is situate may, on an application made to it by the Competent Authority and after holding such inquiry as it may deem fit cause the building, structure, reservoir, dam or tree to be removed or the well or tank to be filled up, and the costs of such removal or filling up shall be recoverable from such owner or occupier in the same manner as if the order for recovery of such costs were a decree made by that court."

In the instant case, it was no where stated that the Competent Authority was Deputy Manager and to that effect a notification was issued. Prima facie, therefore, the contention of the learned counsel Mr.Oza for the appellant is well founded that the respondent no.4 could not take law in his hand and get the construction removed even if the Corporation is satisfied that the construction was illegal.

Mr.Parikh, learned counsel for the respondents, however, stated that at no point of time the Corporation has stated that if the construction is not removed, the authority by taking law in its hands, remove the construction. Relying on various notices and communications. it was submitted by Mr.Parikh that from the record, it was clear that the notification was published as early as in March, 1965 for laying of pipe lines. It was also published in the Official Gazette in

April 1965. Under sub-section (1) of Section 6, after publication of notification, it was not open to any person to make any construction. So far as the society is concerned, even according to its own case, it was incorporated and registered in 1990. Obviously, therefore, the society came to be established after about 25 years from issuance of the notification in the Official Gazette. In these circumstances, it was not open to the society or its members to make construction over the ROU area. It is further submitted that the construction was to be made after taking prior permission of the Corporation which was not done by the society. In these circumstances, it was open to the Corporation to issue notice alleging therein that the construction was made contrary to the provisions of the Act and hence the society had to demolish it. Mr.Parikh stated that if the construction will not be removed, the law will take its own course, namely, the procedure under sub-section (3) of Section 9 of the Act will be followed and the Competent authority will approach the District Judge for appropriate action.

In our opinion, it cannot be said that the action taken by the Corporation is contrary to law or otherwise illegal. The learned Single Judge was also right in relying upon the the ratio laid down by the Supreme Court in A.M.Allison (supra) inasmuch as the case of the Corporation is clear that if the society will not get unauthorised encroachment and construction removed, the law will have to take its course. In these circumstances, it cannot be said that any illegality was committed in issuing notice. So far as the removal is concerned, in our opinion, the competent authority will have to take appropriate proceeding under sub-section (3) of Section 9 of the Act.

For the foregoing reasons, the Letters Patent Appeal deserves to be disposed of by issuing direction that the respondent authority will not take law in its hands for removal of the construction said to have been illegally made by the appellants (petitioners of Spl.C.A.) and the Competent Authority will have to make an appropriate application under sub-section (3) of Section (9) of the Act and the District Judge will decide the said application. Mr.Parikh stated that it would be hazardous if illegal construction and encroachment is allowed to remain on the land for long period. In these circumstances, it is directed that if such application is made by the Competent Authority the District Judge will give top priority and decide the same in accordance with the procedure laid down in sub-section (3) of Section 9

as early as possible preferably before 31st January 1999.

We may clarify that as and when such an application is made in accordance with sub-section (3) of Section 9 of the Act, the District Judge will decide the same on its own merits. The observations made hereinabove have been made only for the purpose of disposal of this Letters Patent Appeal and it should not be understood as having stated anything on merits by this court.

It was stated on behalf of the Corporation that the construction is completely illegal and has been made after more than 25 years of issuance of the notification. On the other hand, contention of the learned counsel for the original petitioners is that the construction was legal and was made only after taking necessary permission from AUDA. We express no opinion on that aspect. It is open to the parties to raise all the contentions available to them.

LPA is accordingly disposed of. No order as to costs.

Dt. 12.10.1998. (C.K.THAKKER J.)

(A.M.KAPADIA J)